

A                    **DATU MOHD AKJAN DATU ALI MOHAMMAD**

v.

**MOHD NAZASLI ABDUL AZIZ**

B                    HIGH COURT SABAH & SARAWAK, KOTA KINABALU  
ABDUL RAHMAN SEBLI JC  
[SUIT NO: K22-130-2007]  
4 FEBRUARY 2010

C                    **CIVIL PROCEDURE:** *Action - Action for recovery of loan paid by cheque - Cause of action founded on payment of cheque - Time to be measured from date cheque is paid - Whether action time-barred by Sabah Limitation Ordinance, Sch item 40*

D                    **LIMITATION:** *Accrual of cause of action - Dismissal of action on ground of time bar - Action for recovery of loan paid by cheque - Cause of action founded on payment of cheque - Time to be measured from date cheque is paid - Whether action time-barred by Sabah Limitation Ordinance, Sch item 40*

E                    The plaintiff granted to the defendant a friendly loan in the sum of RM1,856,250. The loan was paid by cheque directly to Pengurusan Danaharta Nasional Berhad ("Danaharta"). The cheque was dated 14 August 2002 and was cleared on 21 August 2002. The defendant promised to pay back the loan once his company's loan application to Sabah Bank Berhad was approved. Pursuant to the grant of the friendly loan, the defendant had issued to the plaintiff a letter dated 12 August 2002. The defendant subsequently failed to repay the plaintiff's loan although the loan from Sabah Bank Berhad had been approved. The plaintiff filed the present action on 25 July 2007 to recover the loan. The defendant pleaded that the plaintiff's action was time barred and therefore ought to be dismissed by virtue of s. 3 of the Limitation Ordinance (Sabah Cap 72) ("the Ordinance"). The defendant contended that item 40 of the schedule to the Ordinance applied because the plaintiff's claim was based on the cheque, which meant that the limitation period was three years from the date the cheque was paid. The plaintiff on the other hand contended that the suit was governed by item 97 of the schedule to the Ordinance because his cause of action was founded on the letter and not the cheque. If item 97 applied, the limitation period would be six years.

I                    **Held (dismissing the plaintiff's claim):**

(1) The plaintiff's action was to recover the loan of RM1,856,250 paid by cheque on 21 August 2002. The cause of action was clearly founded on the payment of this cheque and not on a

loan repayable on the occurrence of a future contingent. The plaintiff had given the cheque to the defendant on 14 August 2002 and was cleared for payment on 21 August 2002. Time for purposes of the Limitation Ordinance must therefore be measured from that date because that was the date the cheque was paid. (para 16)

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- (2) Where there is a conflict between a specific statutory provision and a general provision, the specific provision shall prevail, *generalia specialibus non derogant*. Since the loan in this case involved a cheque, the law that governed the suit was item 40 of the schedule (which makes specific reference to a cheque) and not item 97. Item 97 was irrelevant because being a residual provision it only applies where “no period of limitation is provided elsewhere in this Schedule.” In this case the period of limitation was “provided elsewhere” in the schedule, namely item 40 of the schedule. (para 18)

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**Case(s) referred to:**

*Lim Kean v. Choo Koon* [1969] 1 LNS 94 HC (*refd*)

**Legislation referred to:**

Control of Rent Ordinance 1956, s. 3(4)

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Limitation Ordinance (Cap 72) (Sabah), s. 3

Limitation Ordinance 1953, s. 6(1)(d)

Limitation Act 1963 [India], art. 113

**Other source(s) referred to:**

Sanjiva Row, *The Limitation Act* 1963, 1973 vol 2, 7th edn, p 551

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*For the plaintiff* - Sugumar Balakrishnan; *M/s Sugumar & Co*

*For the defendant* - Saiful Azian Mokhtar; *M/s Jayasuriya Kah & Co*

*Reported by Amutha Suppayah*

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## JUDGMENT

**Abdul Rahman Sebli JC:**

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**The Facts**

[1] Briefly the facts giving rise to this action are as follows. Sometime in early August 2002 the defendant orally represented to the plaintiff that Millennium Interteam Sdn Bhd (“Millennium”), a company in which he (the defendant) was the single largest

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A shareholder had successfully bid to purchase Marriot Hotel (now known as Le Meridien Hotel) located in Kota Kinabalu at the purchase price of about RM30,000,000.

[2] At the request of the defendant, the plaintiff granted to the defendant a friendly loan in the sum of RM1,856,250 payable directly to Pengurusan Danaharta Nasional Berhad (“Danaharta”) as part payment for the purchase of Marriot Hotel. The loan was paid out in the form of Alliance Bank cheque No. 183908 dated 14 August 2002. It was cleared in favour of Danaharta’s Maybank account on 21 August 2002.

[3] The defendant promised to pay back the loan after Millennium’s loan application of RM50,200,000 from Sabah Bank Berhad (“Sabah bank”) was approved. Pursuant to the grant of the friendly loan, the defendant had on or about 12 August 2002 issued to the plaintiff a letter dated 12 August 2002 the contents of which read as follows:

Mohd Nazasli Bin Abdul Aziz  
10, Jalan Pria,  
Taman Maluri,  
55100 Kuala Lumpur.

12.08.2002

Dear Datu,

As discuss earlier, please help me friendly loan amount RM1,856,250 to pay our loan with pengurusan Danaharta Nasional Bhd to settle the purchase of Marriot Hotel Kota Kinabalu.

I promise to pay your money after our loan from Sabah Development Bank Bhd is approve.

[4] Millennium was subsequently approved a loan of RM50,000,000 by Sabah Bank. Despite having obtained the loan and Millennium having successfully acquired Marriot Hotel from Danaharta, the defendant reneged on his promise to pay back the friendly loan of RM1,856,250 despite numerous requests and demands from the plaintiff including the legal notice of demand dated 6 April 2007. The plaintiff then filed the present action on 25 July 2007.

[5] According to the plaintiff the reason why he avoided making a formal demand before 6 April 2007 was because the defendant and the defendant’s father, Dato’ Abdul Aziz Shamsuddin, who was then the Federal Minister of Rural Development, have been close family friends and he did not want to sever ties with them if he were to resort to legal action.

### Is The Plaintiff's Claim Time Barred?

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[6] The pleaded defence, *inter alia*, is that the plaintiff's action is time barred and therefore ought to be dismissed by virtue of s. 3 of the Limitation Ordinance (Sabah Cap 72) ("the Limitation Ordinance") which provides:

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Subject to ss. 4 to 24 inclusive, every suit instituted after the period of limitation prescribed therefore by the Schedule shall be dismissed.

[7] If the plaintiff's claim is indeed out of time as pleaded then the court has no alternative but to dismiss the claim no matter how strong the plaintiff's case may be on the merits. The defendant's argument is premised on item 40 of the schedule, which sets the time limit as follows:

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| Description of Suit                                            | Period of Limitation | Time from which period begins to run |
|----------------------------------------------------------------|----------------------|--------------------------------------|
| 40. Like suit when the lender has given a cheque for the money | Three years          | When the cheque is paid              |

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[8] This is disputed by the plaintiff who contends that item 97 and not item 40 applies. Item 97 of the schedule provides as follows:

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| Description of Suit                                                               | Period of Limitation | Time for which period begins to run |
|-----------------------------------------------------------------------------------|----------------------|-------------------------------------|
| 97. Suit for which no period of limitation is provided elsewhere in this Schedule | Six years            | When the right to sue accrues       |

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[9] Which of the two items applies, item 40 or item 97? The defendant says item 40 applies because the plaintiff's claim is based on the cheque (P1A), which means the limitation period is three years from the date the cheque was paid. The plaintiff contends otherwise. He says that the suit is governed by item 97 because his cause of action is founded on the letter at P3 and not the cheque. This action was filed on 25 July 2007. If the plaintiff's claim is founded on the cheque as contended by the defendant his claim would fall flat to the ground as it was filed 5 years after payment of the cheque in favour of Danaharta on 21 August 2002, way beyond the time limit of three years set by item 40.

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A [10] The main thrust of the plaintiff's argument is that since  
B repayment of the RM1,856,250 loan was contingent upon the  
C occurrence of an event, ie, approval of Millennium's loan by Sabah  
Bank this would take the suit outside the scope of items 40 - 47  
of the schedule, leaving only item 97 to fall back on. In other  
words it becomes a suit "for which no period of limitation is  
provided elsewhere in the schedule" which allows for a limitation  
period of six years from the time the right to sue accrued. The  
plaintiff's contention is that since the loan of RM1,856,250 was only  
repayable after Millennium's loan application was approved by Sabah  
Bank, the right to sue only accrued after the loan was approved,  
which occurred after 12 August 2002 and before 23 May 2003. For  
this proposition the plaintiff relied on *Lim Kean v. Choo Koon* [1969]  
1 LNS 94 where Yong J said:

D ... the period of limitation does not begin to run until there is a  
complete cause of action, and a cause of action is not complete when  
all the facts have not happened which are material to be proved to  
entitle the plaintiff to succeed.

[11] With due respect the plaintiff's reliance on *Lim Kean v. Choo  
Koon* is misconceived. The decision in that case turned on  
E s. 6(1)(d) of the Limitation Ordinance 1953 ("the 1953  
Ordinance") which is worded differently from item 97 of the  
schedule to the Limitation Ordinance the major difference being,  
the provision speaks of recovery of any sum recoverable by virtue of  
a written law whereas item 97 of the schedule speaks of a suit for  
F which no period of limitation is provided elsewhere in the schedule.  
For ease of reference s. 6(1)(d) of the 1953 Ordinance is  
reproduced below:

G 6(1) Save as hereinafter provided the following actions shall not be  
brought after the expiration of six years from the date on which  
the cause of action accrued, that is to say:

(d) actions to recover any sum recoverable by virtue of any  
written law ...

H [12] In that case the plaintiff had applied to the Rent Assessment  
Board to fix the "maximum recoverable rent" payable by him to the  
landlord. Pursuant to the application an order was made by the  
Board on 15 February 1966 fixing the maximum recoverable rent at  
\$50. The plaintiff claimed the excess amount paid from  
15 November 1957 to 31 January 1966. The basis of his claim was  
I s. 3(4) of the then Control of Rent Ordinance, 1956 ("the Control  
of Rent Ordinance") which reads:

A tenant who has paid his landlord a sum in excess of the rent which may lawfully be received under the provisions of this section may recover such sum from the landlord.

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[13] The defendant contended that the claim was barred by limitation for the reason that the period of limitation ran from the date when each excess payment was made. The plaintiff on the other hand argued that it ran from the date of the order of the board fixing the “maximum recoverable rent”. In giving judgment in favour of the plaintiff, the court held that the period of limitation commenced to run only from the date of the order of the board which was the date when the cause of action accrued.

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[14] The facts and issues in *Lim Kean v. Choo Koon* are obviously not germane to the facts and issues in the present case. The law involved was also different. The sum the plaintiff sought to recover from the defendant in that case was a sum that was recoverable by virtue of a written law, ie, the Control of Rent Ordinance. The plaintiff’s claim is different. The loan that he granted to the defendant is not a loan that is recoverable by virtue of any written law. The decision in *Lim Kean v. Choo Koon* is therefore irrelevant and of no assistance to the plaintiff’s case.

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[15] In my view the plaintiff’s argument is an attempt to give a different colouring to his claim in order to get around item 40 of the schedule. This is the kind of argument the learned authors of Sanjiva Row’s, *The Limitation Act 1963*, vol. 2, 7th edn. 1973 must have had in mind when, in dealing with art. 113 of the Indian Limitation Act 1963 which is in *pari materia* with item 97 of the schedule they said at p. 551:

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In determining whether a particular suit falls under any other article, regard should be had to the substance of the claim rather than to the particular colouring given to it by the plaintiff.

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[16] The plaintiff’s action pure and simple is to recover the loan of RM1,856,250 paid by cheque on 21 August 2002. The cause of action is clearly founded on the payment of this cheque and not on a loan repayable on the occurrence of a future contingent. The language of item 40 is clear and unequivocal. It states that “when the lender has given a cheque for the money” the limitation period is three years from the time “when the cheque is paid”. In the present case the lender (plaintiff) had given the cheque of RM1,856,250 to the borrower (defendant) on 14 August 2002 and was cleared for payment on 21 August 2002. Time for purposes of the Limitation Ordinance must therefore be measured from that date because that was the date the cheque was paid.

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A [17] In the light of item 40 of the schedule, it is idle in my view to suggest that the plaintiff's cause of action only accrued after Millennium's loan application was approved by Sabah Bank.

B [18] It is trite law that where there is a conflict between a specific statutory provision and a general provision, the specific provision shall prevail, *generalia specialibus non derogant*. Since the loan in this case involved a cheque then the law that governs the suit is item 40 of the schedule (which makes specific reference to a cheque) and not item 97. Item 97 is irrelevant because being a residual provision it only applies where "no period of limitation is provided elsewhere in this Schedule." In this case the period of limitation is "provided elsewhere" in the schedule, namely item 40 of the schedule. Therefore item 97 is taken out of the equation.

D [19] It was contended by the defendant that item 40 does not apply for another reason. The reason is that the cheque was payable not to the borrower, namely the defendant but to a third party, ie, Danaharta for the benefit of another third party, namely Millennium. The basis of this argument is again the contents of the letter (P3) referred to above.

E [20] I am unable to comprehend the logic behind this reasoning. The letter at P3 expressly states that the RM1,856,250 was a friendly loan to the defendant. Clearly therefore the money was lent to the defendant and not to any third party. The third party, Danaharta to whom the money was payable had nothing to do with the loan arrangement between the plaintiff and the defendant. It was not even a party to it. Therefore it is wrong to even remotely suggest that the RM1,856,250 was not repayable by the defendant but by Danaharta. The loan was clearly for the benefit of the defendant and not Danaharta. The fact that the amount was payable to Danaharta or any other third party is of no consequence because what is important is who owed the money, not who received it.

H [21] For reasons stated above I am constrained to rule that the plaintiff's claim is out of time and accordingly dismissed it pursuant to s. 3 of the Limitation Ordinance.

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